NO. 21709

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM WARDEN DUNCAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

114 West Adams Street
Phoenix, Arizona 85003

Attorneys for Petitioner

NO. 21709

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM WARDEN DUNCAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

114 West Adams Street
Phoenix, Arizona 85003

Attorneys for Petitioner

TABLE OF AUTHORITIES

NO. 21709

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM WARDEN DUNCAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

The petitioner in the above entitled cause, by and through his attorneys undersigned, respectfully petitions the Court to rehear this cause and upon such rehearing reverse the judgment of the District Court, and enter a new opinion on behalf of this Court. The following grounds support this petition.

1. The principal issue presented by this appeal from the District Court's judgment upon the jury's verdict is whether a defendant, charged with receiving and concealing stolen motor vehicles in violation of Title 18, Section 2313, U.S.C., is entitled to know the most basic information regarding the alleged offense.

2. The petitioner by means of a bill of particulars

duly filed on October 6, 1966, sought to learn such information as from whom and where the cars had been received, where they were concealed, whether either of the defendants drove the cars, and the pertinent dates of these activities. The motion was denied as to all twenty-two of the particulars. As a result of a later informal conference with the government's attorneys, the defendant-petitioner additionally learned that the cars had been received and concealed somewhere in Phoenix, Arizona, and the serial number, owner and color of each of the two vehicles involved.

3. Maintaining that they were unable to learn even basic information from a defendant who steadfastly maintained his innocence, defense counsel at the pre-trial conference on December 8, 1966, five days before trial, asserted that they were unable because of lack of specificity to develop the defense of alibi or otherwise prepare an adequate defense (P.T. 2-3). Both defendants then offered to open their files upon the government doing likewise in accordance with Rule 17.1, Federal Rules of Criminal Procedure, and the suggestions of the Committee on Pre-trial Procedure as set forth in 37 F.R.D. 95 (1965). The government refused (P.T. 5). The defendant then proceeded to trial knowing absolutely nothing other than the minimal information contained in the indictment, the serial number, owner and color of the vehicles, and the alleged place of receipt and concealment.

4. The only witness who connected the petitioner to the receipt and concealment of the automobiles in question was

a government informant, Robert Menz, presently serving time in a federal prison. The only other witness who was able to in any way link the petitioner to the vehicles was a Beverly Harrell who testified that in the "early fall" of 1965, while staying at the petitioner's home, she on one occasion used a white Chevrolet of undertermined vintage--1960, 1961 or 1962 (T. 63, 64, 67).

5. During the past several years the federal courts, including the United States Supreme Court, as well as various eminent study groups (see, for example, the report of the Committee on Pre-trial Procedure, 37 F.R.D. 95 (1965)), have all urged the expansion of the amount of discovery and information which a person charged with a crime may receive under proper safeguards. This philosophy has received formal approval and recognition by virtue of the amendment of Rule 7(f), Federal Rules of Criminal Procedure. The Committee's notes to the amendment, which was effective July 1, 1966, states that the purpose of the amendment was "to encourage a more liberal attitude by the courts towards bills of particulars...."

6. At trial, because they were not advised of the identity of the person from whom the petitioner allegedly received the car and the other particulars, the petitioner's attorneys were extremely handicapped. They had, five days before trial, indicated to the District Court the nature and extent of their handicap (see P.T. 2-3). Their offer to open their files for inspection upon the government doing likewise

was refused. (See Rule 17.1, Federal Rules of Criminal Procedure and Committee on Pre-trial Procedure, 37 F.R.D. 95, 101 (1965).)

7. This Court in its opinion treated the granting or denying of a bill of particulars as "a matter within the discretion of the trial judge...." So it is, but the issues raised by this appeal go further. They go, in fact, to the very heart of the proper implementation of the rules of criminal procedure and the petitioner's right, under the Sixth Amendment, to know the "nature and cause of the accusation." Skeletonal pleading such as the government is now permitted and which was used in this case makes it imperative that the petitioner and all others similarly situated receive their full measure of the counter-balancing rights and procedures contemplated by the drafters of the Rules. Because they did not know the identity of the person who allegedly delivered the vehicles, defense counsel were unable before trial to check on his background or his whereabouts on the days in question. His prior record, including perjury, makes his credibility highly suspect. Nor is it any answer, particularly when the witness is an inmate of a federal prison, working closely with the Federal Bureau of Investigation, and acting in his own self-interest (T. 58-60), to suggest, as this Court did, that a continuance during the trial might have solved the problem. Defendants should not be put to this test, rather, as the rules contemplate they should be permitted to use fully before trial the various procedures contemplated by the Rules; at the very

least, the denial of the bill of particulars was an abuse of discretion.

For these reasons, therefore, the Court should rehear this case and reverse its affirmance of the judgment below.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

Attorneys for Petitioner

March, 1968.

I certify that, in connection with the preparation of this petition for rehearing, in my judgment it is well founded and that it is not interposed for delay.

Robert A. Jensen

CERTIFICATION OF DELIVERY

Robert A. Jensen, one of the counsel for the petitioner William Warden Duncan hereby states that he delivered three copies of the foregoing Petition for Rehearing to the United States Attorney, Federal Building, Phoenix, Arizona, this day, March 4, 1968.

Robert A. Jensen